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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner

vs.

KATHLEEN DUBOSE,
Respondent

RESPONDENT'S RESPONSE TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. WAS THE APPLICATION OF *UNITED STATES V. KUBRICK*, 444 U.S. 111 (1979), TO THIS CASE PROPER?

II. WAS THE TRIAL COURT'S CHARGE CLEARLY ERRONEOUS?

LIST OF PARTIES

Kathleen DuBose
Kansas City Southern Railway Company

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TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 729 F. 2d 1026 (5th Cir., 1984).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

I. WAS THE APPLICATION OF *UNITED STATES V. KUBRICK*, 444 U.S. 111 (1979), TO THIS CASE PROPER?

II. WAS THE TRIAL COURT'S CHARGE CLEARLY ERRONEOUS?

STATEMENT OF THE CASE

The facts of the case are adequately set forth in the petition.

I.

WAS THE APPLICATION OF *UNITED STATES V. KUBRICK*, 444 U. S. 111 (1979), TO THIS CASE PROPER?

The federal discovery rule, governing the accrual of a cause of action was created by the United States Supreme Court in *Urie u Thompson*, 337 U. S. 163 (1949), in response to the unduly harsh results that would occur if the traditional accrual rule were applied. The Supreme Court in *Urie* stated that a humane legislative plan, in particular, 45 U.S.C. §56, the Federal Employers' Liability Act, (FELA), would not intentionally penalize blameless ignorance. Thus, under the facts there presented, the Court held that the cause of action accrued "only when the accumulated effects of the deleterious substance manifest themselves." *Urie* at 170.

Mr. Urie evidently had no problems in determining the cause of his pulmonary disease, silicosis. Frequently, however, victims of a latent disease which has become manifest are at a loss for a period of time to know what caused it. This situation was not before the *Urie* court, and therefore not discussed.

United States v. Kubrick, 444 U. S. 111 (1979), held that a cause of action will not accrue until a plaintiff has knowledge of both his injury *and* its cause. The Petitioner speculates that the *Kubrick* standard will destroy the defense of limitations in FELA occupational disease cases. This claim is spurious. There is no evidence that *Kubrick* has usurped the statue of limitations defense in Federal Tort Claims Act (FTCA) cases, involving medical malpractice.

The Petitioner claims that *Kubrick* is a radical departure from *Urie*, noted in the opinion below. This is just not the case. *Urie* was the first case to establish the discovery rule, but the rule has continually evolved through the years. The *Urie* discovery rule was extended to medical malpractice actions under the FTCA in *U. S. v Reid*, 251 F. 2d 691 (5th Cir. 1958). *See also Quinton v. United States*, 304 F. 2d 234 (5th Cir. 1962); *Waits v. United States*, 611 F. 2d 550 (5th Cir. 1980), and *United States v. Kubrick*, 444 U. S. 111 (1979).

In *Emmons v. Southern Pacific Transportation Co.*, 701 F. 2d 1112 (5th Cir. 1983), an FELA case, the Court stated that a cause of action will not accrue against a plaintiff who has no reason to know of his injury at the time it is sustained until he "becomes aware that he has been injured and that his injury is work related." *Id.* at 1119 (citing *Urie*). It is evident that *Kubrick* is not a different standard than *Urie*, but rather represents a refinement of the rule announced in *Urie*. Both cases reflect the same rationale, and the fifth circuit's application of *Kubrick* to this case was proper.

The Petitioner argues that applying *Kubrick* intertwines negligence into the statute of limitations defense. The sole focus of the *Kubrick* test is to determine at what point was the plaintiff aware of both the fact of his injury and its cause. *Id.* at 122. Whatever facts the defendant may have been aware of are irrelevant to the issue of what the plaintiff knew. As such the Petitioner is seeking to interject confusion where none exists.

II.

WAS THE TRIAL COURT'S CHARGE CLEARLY ERRONEOUS?

Rule 51 of the Federal Rules of Civil Procedure states:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

It has been the rule that, in the absence of a proper and specific objection, a party cannot ordinarily claim error in the giving of an erroneous instruction. See C. Wright and A. Miller, Federal Practice and Procedure, §2553 at 639, (1976). The failure to timely and specifically object will bar a later challenge to an instruction. On rare occasions, an appellate court may reverse for plain error where necessary to prevent a miscarriage of justice. *Id.* §2558 at 671-672. Additionally, this exception has been confined to the exceptional case where the plain error has seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Liner v. J. B. Talley & Co., Inc.,* 618 F. 2d 327 (5th Cir. 1980).

The Petitioner invited any error there may have been by separating DuBose's pre-cancer lung disease from the lung cancer and by requesting a jury finding only on the latter as held by the court below. Its position throughout the trial was that damages due to the pre-cancer disease was barred as a matter of law. The fifth circuit was correct in holding that the error, if it was error, was invited and the Petitioner's failure to object properly and direct the trial court's attention to the limitation charges focus on cancer, constituted a waiver.

Finally, the fifth circuit was correct in finding that the error in the jury charge, if any, was not plain error. The Petitioner presented no testimony at the trial that Mr. DuBose knew or should have known that his pre-cancer problems were associated with his employment. The only evidence concerning the limitations issue came from Kathleen DuBose, who testified that her husband first related his disease to his occupation at the time of the diagnosis of cancer in December, 1979. She testified that he related his previous pulmonary difficulties to old war injuries. It is impossible to claim that the error, if any, resulted in any unfairness or injury to the public reputation of the judiciary. As such, the fifth circuit was correct in holding that the error, if any, did not amount to plain error.

CONCLUSION

Kubrick was the Supreme Court's latest pronouncement on the discovery rule in federal cases. It is not a separate and distinct test from *Urie*, but rather represents a continuum in the evolving test. *Kubrick* was properly applied. Finally, Petitioner invited error, if there was any, in the charge, and such did not amount to plain error.

Petitioner's undue prolongation of this matter should be terminated now.

WHEREFORE, Premises Considered, Respondent prays that the Writ of Certiorari be denied.

Respectfully submitted,

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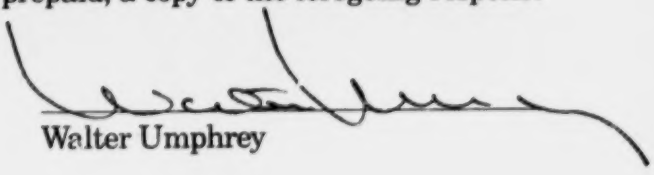
CERTIFICATE OF SERVICE

I hereby certify that I have this 8 day of August, 1984, mailed, postage prepaid, a copy of the foregoing response to adverse counsel.



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